Supreme Court, U.S.
FILED
DEC. 12 1994
OFFICE OF THE CLERK

No. 94-865

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RÜTGERSWERKE AG,

Petitioner,

v.

KAY BETTIS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RICHARD M. FRANKLIN
Counsel of Record

ROBERT L. BERNER, JR.
DAVID P. HACKETT
Baker & McKenzie
One Prudential Plaza
Chicago, IL 60601
(312) 861-8000

Counsel for Petitioner

December 12, 1994

TABLE OF CONTENTS

		Page
1.	This case is properly before this Court	1
2.	The *Aerospatiale* majority opinion is unsound in principle and unworkable in practice	3

TABLE OF AUTHORITIES

CASES:

Hutto v. *Davis*, 454 U.S. 370 (1982) 2

Rodriguez De Quijas v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989) 2

Societe Nationale Industrielle Aerospatiale v. *United States District Court*, 482 U.S. 522 (1987) .. 2-4

Thurston Motor Lines, Inc. v. *Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983) 2

REPORTS/TREATIES:

Report on the Work of the Special Commission of April, 1989 on the Operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, 28 I.L.M. 1556 (1989) 4

The Hague Evidence Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 255, T.I.A.S. No. 7444, 28 U.S.C.A. §1781 (1994) 2-4

NO. 94-865

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RÜTGERSWERKE AG,

Petitioner,

v.

KAY BETTIS, *et al.*,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Rütgerswerke AG ("Rütgerswerke") respectfully submits this reply brief in support of its Petition for a Writ of Certiorari (the "Petition") and in reply to the Brief of Respondents in Opposition to Petition for a Writ of Certiorari (the "Respondents' Brief").[1]

1. This case is properly before this Court.

Respondents contend that review by this Court is precluded because Rütgerswerke's Petition arises from the court of appeals' denial of a mandamus petition directed to the district court's denial of a motion for a protective order to

[1] Rütgerswerke refers to its Rule 29.1 listing included as Appendix D to its Petition. [Petition pp. D-1—D-2]. No amendments are needed to make the listing currently accurate.

require that all discovery from Rütgerswerke be taken pursuant to the Hague Evidence Convention. Respondents emphasize that the only case the lower courts cited in addressing the merits was *Societe Nationale Industrielle Aerospatiale* v. *United States District Court,* 482 U.S. 522 (1987). [Respondents' Brief pp. 5-6]. Respondents overlook that *Aerospatiale* likewise came to this Court through the denial by a court of appeals of a mandamus petition directed to a magistrate judge's order which denied a motion for a protective order to require that discovery be taken pursuant to the Hague Evidence Convention. 482 U.S. at 525-29. Issues involving the tension between the Hague Evidence Convention and federal discovery rules can originate *only* in the context of a discovery dispute, and naturally rise to this Court by the route taken in *Aerospatiale* and now followed by Rütgerswerke.

Respondents also contend that Rütgerswerke may not seek this Court's reversal of *Aerospatiale* because such reversal was not sought in the lower courts. [Respondents' Brief p. 8]. Respondents cite no authority in support of this contention, and there is none. This Court has made clear that the lower courts must follow this Court's precedents, and that this Court alone has the prerogative of overruling this Court's decisions. *See Rodriguez De Quijas* v. *Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989); *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.,* 460 U.S. 533, 535 (1983); *Hutto* v. *Davis,* 454 U.S. 370, 375 (1982). Petitioner need not ask a magistrate judge, or indeed any lower court, to overrule this Court's precedent in order to reserve the right to ask this Court to do so.

2. The Aerospatiale majority opinion is unsound in principle and unworkable in practice.

Respondents claim that because of the split between the ten reported lower court decisions which have ordered litigants to use federal rule discovery and the three decisions which have ordered use of the Hague Evidence Convention procedures, *Aerospatiale* has proven properly decided and workable in practice. [Respondents' Brief pp. 3-5]. The conclusion Respondents draw from these cases is incorrect. Precisely because *Aerospatiale* is unworkable, the three cases ordering Hague Evidence Convention discovery have taken the extraordinary step of following the *Aerospatiale* minority analysis. [Petition pp. 21-22]. If Rütgerswerke's motion for protective order had come before any of these courts, it doubtlessly would have been granted. In contrast, the decisions ordering federal rule discovery, including the lower court decisions in this case, have displayed a uniform pro-federal rules bias and an inability to perform the international comity analysis *Aerospatiale* requires. [Petition pp. 22-26]. Indeed, this split in the case law is the most compelling evidence that the lower courts are not following *Aerospatiale* at all, and that *Aerospatiale* therefore is unsound and unworkable.

Rütgerswerke has cited more than 30 commentaries which are critical of the *Aerospatiale* decision, while Respondents have cited *no* authority which suggests that *Aerospatiale* was correctly decided.[2] Respondents are incorrect in

---

[2] Two of the principal commentators Rütgerswerke relies upon are George A. Bermann, Professor of Law at Columbia University, and Russell J. Weintraub, Professor of Law and Holder of the John B. Connelly Chair in Civil Jurisprudence at the University of Texas at Austin. The knowledge and experience of these commentators belie Respondents' contention that

(footnote continues)

asserting that Rütgerswerke seeks the reversal of *Aerospatiale* solely on the basis of these commentaries. [Respondents Brief pp. 6-7]. Rütgerswerke cites these commentaries not just for their authors' conclusions that *Aerospatiale* was decided incorrectly, but also because they elucidate the underlying deficiencies in the *Aerospatiale* majority opinion including its irreconcilability with: (a) the text of the Hague Evidence Convention [Petition pp. 10-13]; (b) the negotiation history of the Hague Evidence Convention [Petition pp. 13-14]; (c) the interests of the other signatory nations and the international community [Petition pp. 14-15]; (d) the 1989 Special Commission Report of the Hague Conference on Private International Law [Petition pp. 16-18]; and (e) the 1990 proposed amendments to the Federal Rules of Civil Procedure [Petition pp. 18-20]. Respondents make no response to any of these points and offer no grounds to support the reasoning of the *Aerospatiale* majority opinion.

Respectfully submitted,

RICHARD M. FRANKLIN
ROBERT L. BERNER, JR.
DAVID P. HACKETT
Baker & McKenzie
One Prudential Plaza
Chicago, IL 60601
(312) 861-8000
Counsel for Petitioner

December 12, 1994

(footnote continued)

Rütgerswerke has cited "Only a handful of students and academics unfamiliar with the working world of international discovery and litigation, along with a few practitioners..." [Respondents' Brief p. 2].